In the

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1759

THE M. J. KELLEY COMPANY AND
THE PEERLESS INSURANCE COMPANY,
Petitioners,

v.

CIPRA, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The M. J. Kelley Company (hereinafter referred to as "Kelley") and the Peerless Insurance Company (hereinafter referred to as "Peerless"), the petitioners herein, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on March 13, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto, *infra*, at pages 10-14. The Court of Appeals, by orders dated April 11, 1978 and May 15, 1978, granted petitioners' motion to stay issuance of its mandate pending application of writ of certiorari. The orders staying issuance of mandate are printed in Appendix A, *infra*, at pages 15-16. The Memorandum Opinion and Order of the United

States District Court for the District of Colorado dated June 10, 1976 is printed in Appendix A, *infra,* at pages 17-26. The Judgment of the United States District Court for the District of Colorado were entered respectively on June 14, 1976 and June 16, 1976, and are printed in Appendix A, *infra,* at pages 27 and 28 respectively. The Order of the United States District Court for the District of Colorado dated July 12, 1976, and denying all post-trial motions is printed in Appendix A, *infra,* at pages 29-31.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit as reflected in its opinion (Appendix A, *infra,* at pages 10-14), was entered on March 13, 1978. No petition for rehearing was filed. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Federal common law of contracts governing interpretation and construction of government contracts under the Miller Act, 40 U.S.C. §§ 270a, *et seq.,* permits an established method of billing, bookkeeping, and payment, widely used by government contractors and subcontractors in large government projects, to establish a course of conduct precluding the contractor or subcontractor and its surety from disputing invoices and billing procedures of its suppliers and lower-tier subcontractors.

STATUTE INVOLVED

This case involves the Miller Act, 40 U.S.C. §§ 270a, *et seq.,* which is printed in its entirety in Appendix B, *infra,* at pages 32-36.

STATEMENT OF THE CASE

This action, originally instituted by Kelley, was jurisdictionally based upon 28 U.S.C. §1332, and sought to re-

cover damages for the wrongful abandonment by Cipra, Inc. (hereinafter referred to as "Cipra") of its obligations under a subcontract to provide services and material on the Federal Bulk Mail Facility located in Commerce City, Colorado, and for submitting false and inaccurate records to support invoices submitted to Kelley for payment.

Cipra counterclaimed for sums allegedly due it under its contract. Cipra also asserted claims against Peerless as surety on the performance and payment bonds provided by Kelley to the Federal Bulk Mail Facility's general contractor as required by Kelley's contract. This contract requirement was imposed upon Kelley as a result of the general contractor's statutory obligation under the Miller Act. Although Cipra asserted no independent jurisdictional basis for its claims against Kelley and Peerless, they were in fact jurisdictionally premised upon the Miller Act, particularly 40 U.S.C. §270a (b).[1]

The trial court held that Cipra should prevail on its counterclaim primarily because, by paying certain invoices without disputing them, Kelley established a "course of conduct" which precluded later disputes. The trial court denied Kelley any relief on its complaint, and the United States Court of Appeals affirmed the trial court's decision in all respects.

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[1] Since no mechanic's lien may be filed with respect to labor or materials furnished for government property, the sole remedy of an unpaid subcontractor, or one who has a contractual relationship with a subcontractor, is a suit under the Miller Act. *Warrior Contractors v. Harders, Inc.,* 387 F.2d 727, 729 (5th Cir. 1967); *Beacon Construction Company of Massachusetts, Inc. v. Prepakt Concrete Co.,* 375 F.2d 977 (1st Cir. 1967); *United States for the Use of B's Company v. Cleveland Electric Company of South Carolina,* 373 F.2d 585, 589 (4th Cir. 1967); *See, J. W. Bateson Company, Inc. v. United States,* 434 U.S. ....., 98 S.Ct. 873, 55 L.Ed.2d 50 (1978) (describing the scope of the Miller Act and defining the term subcontractor.)

SPECIFIC FACTS PERTINENT TO QUESTION PRESENTED

Kelley was the mechanical subcontractor for the Federal Bulk Mail Facility in Commerce City, Colorado from 1973 through May 8, 1975. The general contractor was a joint venture known as Wright-Dick-Boeing, and pursuant to its subcontract, Kelley provided a payment bond with sufficient sureties as required by the Miller Act.

On August 13, 1973, Kelley and Cipra executed a contract pursuant to which Cipra would erect the sheet metal for the project. A copy of this contract is printed in Appendix C, *infra,* at pages 37-47.

On November 14, 1973, Kelley and Cipra executed a second subcontract pursuant to which Cipra agreed to fabricate a portion of the sheet metal for the project. This subcontract is printed in Appendix C, *infra,* at pages 48-54. This second subcontract was anticipated by a letter from Cipra to Kelley dated September 6, 1973. A copy of this letter is printed in Appendix C, *infra,* at pages 55-56.

From the commencement of Cipra's work, in the fall of 1973, to April of 1974, Kelley paid Cipra for all amounts billed, approximately $230,726.24 through April 10, 1974. At about this time, a dispute arose with respect to the amounts due Cipra and the timeliness of Kelley's payments. The specific areas of dispute had to do with the procedures for billing "extras" and Cipra's erroneous inclusion of separate billable hours for supervision, which was contrary to the express language of the contract.

The parties were unable to resolve their dispute, and, on or about October 15, 1978, Cipra abandoned the project.

The procedures employed by Kelley relative to billings, payments, and application of payments were similar in nature to such procedures on most other large federal construction projects. The procedures were designed to provide sufficient cash-flow to Cipra during the course of the project, and substantially to comply with all payments required by the contract. Due to the large volume of accounting data supplied with each billing, Kelley did not audit each billing. Rather, Kelley simply paid the first six invoices and followed the general industry wide practice of postponing until project completion a final reconciliation of accounts.

When the dispute with Cipra arose, Kelley did perform a detailed review of Cipra's billings for the Bulk Mail Facility and discovered improper billings submitted by Cipra and overpayments by Kelley.

THE TRIAL COURT DECISION

As indicated above, the United States District Court for the District of Colorado awarded Cipra the total amount claimed in its counterclaim and denied relief to Kelley on its claims. The trial court's decision is grounded almost entirely on the principle that Kelley's "course of conduct" demonstrated by its having paid invoices from the fall of 1973 through April 1974 precluded any further dispute about the billings. This, despite the testimony that Kelley's billing and payment practices were generally followed in the industry and specifically among government contractors, and despite the absence of the affirmative defenses of waiver and estoppel in Cipra's pleadings.

The result of this determination, which was affirmed in all respects by the United States Court of Appeals for the Tenth Circuit, was to adopt rule of law, presumably applicable to Miller Act cases, which requires immediate audit of all billings on federal construction projects in order to preserve any right to dispute the billing at some later time.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER FEDERAL OR STATE CONTRACT LAW GOVERNS CONSTRUCTION

OF FEDERAL MILLER ACT CONTRACTS. IF FEDERAL, THE COURT SHOULD ARTICULATE THE FEDERAL LAW DELINEATING THE "COURSE OF CONDUCT" PRINCIPLE.

A. Notwithstanding this Court's Decision in *F.D. Rich Co., Inc. v. United States for the Use of Industrial Lumber Co., Inc.*, the Lower Federal Courts Continue to Apply State Law to Construction of Miller Act Contracts.

In *F.D. Rich Co., Inc. v. United States for the Use of Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974), the lower federal courts applied what they believed to be the policy of state law to award attorney's fees to a successful Miller Act plaintiff despite the absence of any contractual term permitting the award of attorney's fees and the absence of a specific federal or state statute on the subject. This Court in rather broad language stated that federal law applied rather than state law, and that under federal law, no attorney's fee award was permissible. Specifically, this Court held:

> The Miller Act provides for a federal cause of action, and the scope of the remedy as well as the substance of the right created thereby is a matter of federal not state law. . . The reasonable expectations of such potential litigants are better served by a rule of uniform national application.

417 U.S. at 127.

Despite this Court's clear pronouncement on the subject, the various Circuit Courts of Appeal are divided as to what law applies to the construction of contracts subject to the Miller Act and have taken essentially three positions.[2]

[2]See generally, *United States for the Use of Building Rentals Corp., v. Western Casualty and Surety Company*, 498 F.2d 335, 338 n.4 (9th Cir. 1974) for a collection of conflicting cases. *See also, Burgess Construction Company v. Morrin & Son Company, Inc.*, 526 F.2d 108 114 n.2 (10th Cir. 1976).

First, several circuits have held that state substantive law controls over federal substantive law. *See, e.g., United States for the Use of Aucoin Electric Co. v. Safeco Insurance Co. of America*, 555 F.2d 535, 541 (5th Cir. 1977) wherein the court stated:

> The issue [regarding materiality of a contract breach] does not involve any construction of the Miller Act, to which federal law would apply, but involved [sic] performance in Texas of a contract made in Texas.

The court proceeded to apply Texas law.

Second, several circuits have held, in conformity with *F.D. Rich Co., supra*, that federal substantive contract law governs Miller Act cases.

Finally, the Tenth Circuit Court of Appeals has on occasion applied so-called "general principles of contract law" to construe Miller Act contracts. Thus, for example, in *United States for the Use of Clark Engineering Co. v. Freeto Construction Co., Inc.*, 547 F.2d 537 (10th Cir. 1977), the court was asked to determine the propriety of assessment of liquidated damages by the government against a contractor which had delayed performance beyond the time limits provided by the contract. The court determined the applicable law by stating the following:

> And though Clark argues that Utah law should apply, it would appear that this case may be resolved under the general rules of contract law.

547 F.2d at 539.

With these three positions prevailing in the important area of Miller Act contracts, it is impossible to achieve the goal announced in *F.D. Rich Co., Inc., supra*, to serve the reasonable expectations of potential Miller Act litigants by adopting rules of uniform national application.

B. Federal Substantive Contract Law Should Not Permit Billing and Accounting Practices of General Application Among Government Contractors To Be Viewed As a "Course of Conduct" In Effect Waiving All Rights to Reconcile Accounts At Project Conclusion.

It is a virtually universal principle of contract law, both federal and state, that to amount to waiver, ratification, or to work an estoppel, a course of conduct must indicate the voluntary relinquishment by a competent person or entity of a known right with the intent that the right be surrendered and that the person or entity be forever deprived of its benefits.[3] Adapting this principle to the case presently before this Court, in order for Kelley to have been precluded from contesting paid Cipra invoices, Kelley's payments must have been made with full knowledge of all items which comprised the invoices when paid. *Stanolind Oil & Gas Company v. Bridges,* 160 F. Supp. 798 (E.D. Okla. 1958).

The evidence before the trial court in this case demonstrated that Kelley did not voluntarily pay invoices with the

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[3] *See, e.g., Hampton v. Paramount Pictures Corp.,* 279 F.2d 100 (9th Cir. 1960) (elements of estoppel include knowledge of party estopped); *Albert v. Joralemon,* 271 F.2d 236 (9th Cir. 1959) (elements of waiver); *State Farm Mutual Automobile Insurance Co. v. Petsch,* 261 F.2d 331 (10th Cir. 1959) (estoppel requires knowledge; waiver requires voluntary action); *Phillips v. Legaly,* 214 F.2d 527 (10th Cir. 1954) (definition of waiver); *Fox Realty Co. v. Montgomery Ward & Co.,* 124 F.2d 710 (7th Cir. 1942); *Schmidt v. Interstate Federal Savings and Loan Association,* 74 F.R.D. 423 (D.D.C. 1977) (waiver requires voluntary relinquishment of a known right); *Atlantic Richfield Co. v. C.R.A., Inc.,* 430 F. Supp. 1299 (D. Tex. 1975) (estoppel requires knowledge); *Williams v. Gulick,* 170 Colo. 347, 461 P.2d 211 (1969); *French v. Patriotic Insurance Co.,* 107 Colo. 275, 111 P.2d 893 (1941); *Wishered v. Noonen,* 71 Colo. 218, 205 P. 530 (1922); *Shoemaker v. Mountain States Tel. & Tel. Co.,* ____ Colo. App. ____, 559 P.2d 721 (1976); *Colorado Bank and Trust Co. v. Western Slope Investors,* 36 Colo. App. 149, 539 P.2d 501 (1975).

intent to preclude the possibility of disputing them when it reconciled accounts at the conclusion of the project. The act of paying invoices in this manner should not have such an effect, and the principle announced and applied by the trial court and ratified by the Circuit Court of Appeals should not be viewed as the federal substantive law applicable to Miller Act contracts. This Court should resolve that the appropriate source of Federal Miller Act contract law is federal law and determine that the "course of conduct" principle announced and applied in this case is contrary to that law.

CONCLUSION

Based upon the foregoing, this petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX A

FOR ROUTINE PUBLICATION
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1810

THE M. J. KELLEY COMPANY, Plaintiff-Appellant, v. CIPRA, INC., Defendant, Counterclaimant, Appellee, v. PEERLESS INSURANCE COMPANY, Defendant on Counterclaim, Appellant.	Appeal From The United States District Court For The District of Colorado (D.C. #74-F-1050)

James R. Prochnow, of Hindry & Meyer, P.C., Denver, Colorado, for Appellants.

W. Robert Ward, Denver, Colorado (William J. Bourke III, Denver, Colorado, with him on the Brief), for Appellee.

Before SETH, Chief Judge, McWILLIAMS and McKAY, Circuit Judges.

SETH, Chief Judge.

This is an action commenced by a mechanical contractor against his subcontractor for breach of contract. The defendant initially was to provide labor to install sheet metal components fabricated by a third party in a building for which the plaintiff had a mechanical subcontract. The arrangement was expanded to cover "extras" performed by the defendant. The defendant filed a counterclaim for unpaid labor costs and extras. An additional party defendant, a bonding company, was added.

The case was tried to the court which entered judgment against plaintiff and for the defendant on the counterclaim, together with interest. The plaintiff appeals.

The trial court found that plaintiff Kelley was billed by the defendant Cipra as the work progressed, but payments were not made monthly in the billed amounts. Cipra claimed, and the trial court found, that the arrears then totaled $155,000.00. Also disagreements arose and the contract was terminated. The sheet metal work was completed by another contractor.

The trial court found that the arrangement and the rates were controlled by the contract of August 13, 1973, by a letter of September 6, 1973, and by an additional contract of November 14, 1973, and by the purchase orders issued by Kelley for the "extras" performed by Cipra. The court placed much reliance on the course of conduct of the parties. It concluded that defendant gave proper notice that it was going to terminate the contract if not paid, and the termination was justified. The court thus found that the amount was due on a designated date, and the plaintiff had breached the contract by its failure to make the required payments.

The case is basically a tort case and we must hold that the trial court's findings of fact are supported by the record.

Much of the dispute centers on the billing and payment for "extras." These were items not originally contemplated, but which became necessary because the fabricated sheet metal work was made elsewhere, and some arrived in damaged condition, some was missing, and much additional handling and sorting was required. Kelley asked

Cipra for a proposal as to how this added work should be handled. Cipra prepared the letter of September 6, 1973, in response, delivered it to Kelley's local representative who initialed it and sent it to the Cleveland office of Kelley. It was signed by the officer who signed the original contract and returned to Cipra. Thereafter Cipra billed on the basis of the letter "time and material." The letter specified the labor charges by Cipra for shop and job work. This letter also provided for monthly billing as did the original contract, and the early billings were paid. The labor rate was increased when the Union scale went up, and billings were paid without objection at the new scale. The time and material billings were covered by purchase orders.

There is no basis for any dispute as to the provisions for monthly billings for the basic contract, and the billings for extras on a monthly basis. The payments were not conditional upon Kelley receiving its payments from the general contractor. Such a condition had been eliminated from the contract proposed initially.

The record thus shows, as the trial court found, that Kelley did not make the monthly payments as due. The breach of contract by Kelley was thus established. *See* Barrett-Moore & Associates v. United States, 367 F.2d 122 (10th Cir.).

There is some dispute as to the billing for wages of a foreman as labor, but the record is clear that the local representative of Kelley checked the weekly time records, was aware of this person's position, and approved the schedules. This was an acceptance of this employee's pay as properly chargeable to labor.

The trial court properly considered the transactions which took place before the breach as part of the conduct of the parties to evaluate the contentions of error and inadvertence advanced by Kelley. The court also properly used this information in its construction of the letter and

the agreements. In Hensel Phelps Const. Co. v. United States, 413 F.2d 701 (10th Cir.), a Miller Act case, we referred to correspondence between the parties, and said: " . . . This evidence was pertinent because if the contract is not clear the conduct of the parties is given great weight in construing it (Citing cases)." *See also* United States v. Cross, 477 F.2d 317 (10th Cir.); Whitebird v. Eagle-Picher Co., 390 F.2d 831 (10th Cir.).

The trial court included prejudgment interest in its judgment. It found that the obligation was founded in the contracts and the letter.

The contract provides that Cipra will be reimbursed its interest costs incurred in meeting its payroll. The funds were borrowed from the parent companies of Cipra as required under their corporate regulations. Cipra was charged interest on the advances and this was testified to be in the amount of $22,646.19. This was the amount awarded by the court, and it appears to be based on the contract provisions rather than on the statutes of Colorado. The prejudgment interest is clearly part of the recovery to which the defendant was entitled under the contract.

The plaintiff Kelley urges that the trial court abused its discretion in not granting its motion for a continuance. The motion was based on the unavailability of a witness and was made about twelve days before trial. It was denied on April 22d, and on renewal with some additional grounds on April 26th. The new grounds advanced a claim that the contract matter should have been arbitrated, a point not raised before in the proceedings. The matter was pretried, further conferences were had, and status reports made to the court. The pretrial order was entered, and no attempt was made by plaintiff to have it include the arbitration matter. The arbitration issue was thus removed from the case for all purposes.

The remaining ground for continuance was the absence of Mr. Leonard A. Keller, who was described as the plaintiff's principal witness.

The record shows that there was adequate notice of trial, and the pretrial order of July 14, 1975, recited that Mr. Keller would be present at the trial. The matter of continuance under these circumstances is well within the discretion of the court. We cannot say that the trial judge abused his discretion.

We have examined the other points urged on appeal, and conclude that the trial court should be affirmed in all respects.

AFFIRMED.

MARCH TERM – APRIL 11, 1978

Before Honorable Oliver Seth, Honorable Robert H. McWilliams, and Honorable Monroe G. McKay, Circuit Judges.

THE M. J. KELLEY COMPANY,
Plaintiff-Appellant,
v.
CIPRA, INC.,
Defendant, Counterclaimant,
Appellee,
v.
PEERLESS INSURANCE COMPANY,
Defendant on Counterclaim,
Appellant.

No. 76-1810

This matter comes on for consideration of the motion of M. J. Kelley Company, et al. for stay of the mandate in the captioned cause pending application to the United States Supreme Court for Writ of Certiorari.

Upon consideration whereof, it is the order of the Court as follows:

1. The issuance of the mandate is stayed in the captioned cause until May 3, 1978, pending certiorari and that if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellants have timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

2. This order is conditioned upon the continuance in full force and effect of the supersedeas bond in the amount of $185,000.00 presently on file in the United States District Court for the District of Colorado, or an equivalent bond in the sum of $185,000.00. In adopting this bond the Court is disregarding the accrual of interest on the judgment.

HOWARD K. PHILLIPS
Clerk

MAY TERM – MAY 25, 1978

Before Honorable Oliver Seth, Honorable Robert H. McWilliams, and Honorable Monroe G. McKay, Circuit Judges.

THE M. J. KELLEY COMPANY,
Plaintiff-Appellant,
v.
CIPRA, INC.,
Defendant, Counterclaimant,
Appellee,
v.
PEERLESS INSURANCE COMPANY,
Defendant on Counterclaim,
Appellant.

No. 76-1810

This matter comes on for consideration of appellants' motion for further stay of the mandate in the captioned cause.

Upon consideration whereof, the motion is granted. The mandate in the captioned cause shall be stayed until June 13, 1978, pending certiorari, and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellants have timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 74-F-1050

THE M. J. KELLEY COMPANY,
Plaintiff,
v.
CIPRA, INC.,
Defendant and
Counterclaimant,
v.
PEERLESS INSURANCE COMPANY,
Defendant on Counterclaim.

Memorandum Opinion and Order

Judge Sherman G. Finesilver:

We are called on to resolve a dispute between the parties to a construction subcontract involving part of the construction of the United States Post Office Bulk Mail Center in Commerce City, Colorado. The principal contractor was Wright-Dick-Boeing – not a party here.

Plaintiff M. J. Kelley Company, an Ohio corporation, was the mechanical subcontractor. Cipra, Inc., a Colorado corporation, entered into a subcontract August 13, 1973 with Kelley to install sheet metal to be manufactured by a third party. Cipra was to be paid all of its labor costs on the job monthly, and 75% of its agreed management fee. Later, Cipra and Kelley arranged for extra work by Cipra related to the basic subcontract, which Cipra was to bill monthly, the same as the basic subcontract.

Cipra billed Kelley for the work as it went along, but claims Kelley was not paying in full, and Kelley continued to fall behind in its payments for labor and material to Cipra until $155,681.49 was owed to Cipra for work and materials furnished Kelley.

Before the completion of the subcontract, disagreements between Cipra and Kelley resulted in the termina-

tion of their working relationship and the job was subsequently partially completed by Hodous & Friedman, Inc. [Hodous]. Thereafter, Kelly commenced this action seeking damages it allegedly suffered as a result of defendant's claimed breach and for alleged increased costs to complete the work, and for claimed overpayments to Cipra.

Cipra has denied liability to Kelley for any amount, and has counterclaimed against Kelley and Peerless Insurance Company, Kelley's surety which guaranteed that Kelley would pay labor and material bills on the job, for the labor and material furnished by Cipra in the amount of $155,681.49. Kelley denied liability to Cipra for these labor and material bills.

We find issues joined in favor of the Defendant and against Plaintiff and Peerless Insurance Company.

FINDINGS OF FACT

I

As noted Kelley and Cipra entered into a subcontract August 13, 1973 (Exhibit 3). Under that agreement, defendant agreed to install sheet metal to be manufactured by a third party. Cipra was to be paid all of its labor costs each month, plus 75% of the management fee. There were "extras" in the way of additional projects which defendant agreed to perform incidental to the subcontract and for which Cipra was to be paid monthly, as under the basic subcontract.

The arrangement between the parties is demonstrated by the original subcontract (Exhibit 3), the later subcontract (Exhibit 4) and the many purchase orders executed by plaintiff for the various "extras". (See Exhibits E,P, and R, and Exhibits 69-84). The latter exhibits reflect that modification and extra work added to the performance by Cipra, pursuant to Kelly purchase orders properly authorized. For example, the sheet metal arrived from out-of-state

at the job site out of sequence, with parts missing and defective and damaged parts. Extensive sorting and storage of the sheet metal was necessary prior to the commencement of the Cipra work as provided in Exhibit 3, paragraph 5(a), page 2. The early need for extra Cipra labor and material led to Kelley's job manager, Mr. Stripp, to request Cipra's advice about work. Thereafter Cipra furnished their basic proposal (Exhibit C) setting forth both field and shop labor rates and material prices for extras. Mr. Joseph Mohar of Kelley's Cleveland office, who had signed the basic subcontract (Exhibit 3) for Kelley, signed Exhibit C for Kelley and returned it to Cipra. Mohar had authority to approve the supplemental agreement and thereafter Cipra performed extra work added by Kelley purchase orders, and Cipra's billing was all work as provided in Exhibit C, and as later modified by the increased labor rate set forth in Exhibit D. We find it persuasive that Kelley never contested Cipra's billing rates on extras until this suit.

II

The financial relationship between the parties is well summarized in Exhibit F. It reflects Kelley paid to Cipra a total of $349,081.49. It also shows that defendant's billings were for a total of $530,141.47 of which Wright-Dick-Boeing paid $25,378.49, and the testimony and other exhibits supports the validity of those charges. The balance due from Kelley therefore, is $155,681.49. The testimony and exhibits which support the charges consists of Exhibit 3, the basic contract, under which labor was billed at $12.73 per hour which was later increased to $14.63 per hour pursuant to Exhibit D. The management fee, likewise, is based on Exhibit 3 and totals $28,642.49. Other pertinent exhibits include Exhibits E, P, and R under which the billing rate was set by Exhibit C, and which was increased pursuant to Exhibit D, which addresses the union wage increase effective July 1, 1974. Likewise, Exhibits P, X, Y, W and the

testimony of Madsen and Tamplin support defendant's contentions that the "extras" in Exhibit P, some of which were originally billed to the main contractor, Wright-Dick-Boeing, are appropriately chargeable to Kelley.

We find that the evidence supports the billings submitted by defendant. Plaintiff's objections to the "extras" as beyond the limits of the original subcontract are unsupportable in view of the subsequent letter applying a higher rate of compensation. We find that the later letter and the course of conduct by the parties evinces a clear understanding and agreement that the higher rate applies to the billed "extras".

The "extras" were all added on to the subcontract subsequent to its original execution. On September 6, 1973, by letter, a portion of those "extras" was agreed to by the parties. On November 14, 1973, a separate subcontract became part of the working relationship between plaintiff and defendant. It is clear that under this combination of agreements and subcontracts, Kelley was obligated to meet its monthly payment date to Cipra, but that Kelley failed to do so. The testimony clearly showed that plaintiff was given reasonable notice of defendant's intention to terminate on October 14, 1974, unless payment was made and that plaintiff did not meet its obligations. In our view, when Cipra's men left the job nearly 21,000 plus hours work had been performed (contract spoke in terms of 20,000) and also 90% of the job had been completed by Cipra. The termination announced in turn by plaintiff on October 21, 1974 for alleged breach by defendant was ineffective in the fact of plaintiff's pre-existing breach of its duty to pay defendant.

III

We find that because there were timely demands for the sums due here, and those payments became due as of November, 1974, Cipra is entitled to interest as of that date.

That amount is $22,646.19 (Exhibit BB) and is in accordance with the terms of the contract. (See Exhibit 3, Art. 8).

In addition, the third-party defendant, Peerless, is jointly and severally liable under the surety bond issued for this contract. As noted, Peerless as surety executed the performance and payment bond (Exhibit G) guaranteeing payment of labor and material bills of Kelley in performance of the work.

IV

We further find the sum of $155,681.49 constitutes past due amounts owed by Kelley to Cipra as a contractual obligation of Kelley. The sum was properly presented to Kelley and Kelley is obligated to pay the same. We find it especially persuasive that until April, 1974, the parties observed the respective contractual obligations without difficulty. This course of dealing emphasizes the legitimacy of Cipra's demands. The repeated payments made under the contract prior to the dispute here are highly persuasive of the acceptance by Kelley of Cipra's interpretation of the contract. Such a course of dealing has great force in interpreting the contract and has been considered by the court in reaching its conclusions. We find that the course of dealing demonstrates a clear agreement by the parties as to the terms of the contract and is evidence of what was contemplated by the contract. The later attempt by Kelley to vary the procedures is in derogation of the contract and constitutes wrongful breach. Although not determinative, the fact that Kelley has presented the instant billings of defendant to the main contractor, Wright-Dick-Boeing, in their entirety, serves to underscore our findings that the claims are legitimate.

V

There was certainly no evidence of waiver by Cipra of Kelley's breach. We find that Cipra made a reasonable

and timely demand upon plaintiff to fulfill its obligation to make monthly payments. We further find that this constituted a substantial breach of the agreement between the parties with respect to the original subcontract and the "extras" later appended thereto. The materiality and substantiality of the monthly payment provision is revealed by the early stages of the contract negotiation period. Kelley offered to Cipra a subcontract which had previously been used by Kelley in other jobs. (Exhibit 2— Memphis contract). One term of that original contract provided that the duty to be paid by subcontractor was contingent upon the subcontractor being first paid by the main government contractor. Cipra objected to that clause, and insisted that it be stricken, clearly showing a concern that it be paid promptly each month regardless of whether the subcontractor received its payment from the government first. It was of the essence of the agreement that Cipra was to be promptly paid on a monthly basis for the work performed.

Evidence has been presented that Kelley only had a responsibility to pay Cipra when Kelley was paid. We have considered and reject this contention. The persuasive evidence and course of conduct of the parties is to the contrary.

VI

We underscore the fact that prior to April, 1974, the billings by Cipra to Kelley were paid with relative promptness. The course of conduct in accepting these billings supports Cipra's view that the billings were proper and we so find. The attempts after April 1974 by Kelley to vary its payments from the billings submitted by defendant constitutes a divergence from the agreement between the parties rather than a late attempt by plaintiff to enforce the contract. (Testimony of A. Zetts, Englehart, and R. Zetts).

Testimony revealed that during August of 1974, officials of Kelley and Cipra had a number of meetings in Denver, during which the failure of Kelley to promptly pay

Cipra was discussed. Additional documenting supplied for Cipra's claim was given to key officials of Kelley who promised to check into the matter upon their return to Cleveland. No response in this regard was forthcoming from Kelley's executives.

The evidence clearly supports Cipra's claim that it continually insisted that Kelley fulfill its contractual obligations. There was thus a continuous period during the life of the contract during which Cipra made repeated and reasonable demands upon plaintiff, culminating in defendant's notice that it would withdraw its workers from the job on October 14, 1974.

VI (sic)

Thus, plaintiff wrongfully breached the contract, and defendant's refusal to continue work under the exigent circumstances was justifiable. Defendant is entitled to the past due payments under the contract for labor and material and services performed. The testimony and exhibits reveal that amount to be $155,681.49.

Plaintiff's claim for damages, however, cannot be sustained. Plaintiff's claim is predicated upon a wrongful breach by defendant. The credible evidence fails to support a finding of such breach, and, as stated above, supports the contrary conclusion. The testimony and exhibits show that defendant performed its work in an acceptable workmanlike manner under industry standards. Also through its course of dealings, it is clear that plaintiff's eleventh-hour claims of mismanagement and misconduct by defendant are unfounded. Kelley's strenuous urgings that the labor of certain supervisory employees was improperly billed as that of nonsupervisory personnel is unfounded and inconsistent with plaintiff's past practices. We find that such billing was consistent with the agreement between the parties and was accepted as such by the plaintiff.

The claim by plaintiff that it was forced to "cover" by hiring Hodous & Friedman, Inc. at a higher price than the contract price is irrelevant in view of plaintiff's breach of agreement. We find it unnecessary to determine whether plaintiff failed to mitigate its damages in view of the fact that plaintiff wrongfully breached the contract and thus has had no damages chargeable to defendant.

CONCLUSIONS OF LAW

I

The unpaid balance due Cipra from Kelley for labor, material and 75% of the management fee is the sum of $155,681.49 under the terms of the subcontracts and the purchase orders; further, that the said sum of $155,681.49 is the amount due as damages to Cipra for Kelley's breach of its contractual duties.

II

The sum due Cipra has been due and owing from November, 1974 by Kelley, and that interest thereon, as provided by the contract of the parties is due and owing in the sum of $22,646.19.

III

Judgment shall be entered in favor of Cipra and against Kelley for the sum of $155,681.49 plus interest of $22,646.19 or a total judgment against Kelley of $178,327.68 and costs.

IV

Peerless Insurance Company, surety on the bond of Kelley, is jointly and severally liable with Kelley for the claims of Cipra, and judgment shall enter thereon in favor of Cipra and against the Peerless Insurance Company in the sum of $178,327.68 and costs.

V

Kelley wrongfully breached the contractual arrangement with Cipra and failed to substantially perform in accordance with the terms of the contract by its failure to pay Cipra pursuant to its agreement. Kelley is not entitled to recover any damages from Cipra for Kelley's excess costs on remaining sheet metal work (Hodous & Friedman engagement by Kelley).

ORDER

On its counterclaim, the issues are joined in favor of defendant Cipra and against plaintiff Kelly and against third party defendant Peerless Insurance Company; on the complaint, the issues are joined in favor of defendant Cipra and against plaintiff Kelley and plaintiff's complaint is dismissed.

Judgment to enter in favor of defendant Cipra for $178,327.68 on Cipra's counterclaim and in favor of defendant Cipra against plaintiff Kelley on plaintiff's complaint. Defendant Cipra to be awarded its costs.

DATED at Denver, Colorado, this 10th day of June, 1976.

BY THE COURT:

SHERMAN G. FINESILVER,
Judge United States District Court

APPEARANCES

FOR THE PLAINTIFF: M. J. KELLEY CO. and FOR DEFENDANT ON THE COUNTERCLAIM: PEERLESS INSURANCE COMPANY.	James R. Prochnow, Esq. Thomas J. Constantine, Esq. Hindry & Meyer, P. C. 2300 First National Bank Bldg. Denver, Colorado 80202 and Keith A. Savidge, Esq. 4169 Pearl Road Cleveland, Ohio 44109
FOR THE DEFENDANT and COUNTER-CLAIMANT: CIPRA, INC.	W. Robert Ward, Esq. William J. Bourke, III., Esq. Weller, Friedrich, Hickisch & Hazlitt 900 Capitol Life Center Denver, Colorado 80203

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

THE M. J. KELLEY COMPANY, Plaintiff, v. CIPRA, INC., Defendant and Counterclaimant, v. PEERLESS INSURANCE COMPANY, Defendant on Counterclaim.	Civil Action No. 74-F-1050 JUDGMENT

THIS ACTION came on for hearing, and in accordance with a Memorandum Opinion and Order duly entered by the Honorable Sherman G. Finesilver on June 10, 1976, it is hereby

ORDERED AND ADJUDGED that judgment enter in favor of Defendant Cipra, Inc. for $178,327.68, plus interest at the legal rate, on Cipra's Counterclaim and in favor of Defendant Cipra, Inc. against Plaintiff M. J. Kelley Company on Plaintiff's Complaint. Further, Defendant Cipra, Inc. to be awarded its costs which are to be taxed upon the filing of a bill of costs with the clerk of this Court.

Dated at Denver, Colorado, this 14th day of June, 1976.

FOR THE COURT:
JAMES R. MANSPEAKER,
Clerk

By: _____
Stephen P. Ehrlich,
Chief Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE M. J. KELLEY COMPANY, Plaintiff, v. CIPRA, INC., Defendant and Counterclaimant, v. PEERLESS INSURANCE COMPANY, Defendant on Counterclaim.	Civil Action No. 74-F-1050 AMENDED JUDGMENT

THIS ACTION came on for hearing, and in accordance with a Memorandum Opinion and Order duly entered by the Honorable Sherman G. Finesilver on June 10, 1976, it is hereby

ORDERED AND ADJUDGED that judgment enter in favor of Defendant Cipra, Inc. against the M. J. Kelley Company and Peerless Insurance Company, jointly and severally, for $178,327.68, plus interest as provided by law, on Cipra's Counterclaim; and in favor of Defendant Cipra, Inc., against Plaintiff M. J. Kelley Company on Plaintiff's Complaint. Further, Defendant Cipra, Inc. to be awarded its costs which are to be taxed upon the filing of a bill of costs with the Clerk of this Court.

Dated at Denver, Colorado, this 16th day of June, 1976.

FOR THE COURT:

JAMES R. MANSPEAKER,
Clerk

By: _____
Stephen P. Ehrlich,
Chief Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 74-F-1050

THE M. J. KELLEY COMPANY, Plaintiff, v. CIPRA, INC., Defendant and Counterclaimant, v. PEERLESS INSURANCE COMPANY, Defendant on Counterclaim.	Order Denying Post Trial Motions of Plaintiff, M. J. Kelley Co., and of Defendant on Counterclaim Peerless Insurance Co.

We have considered the Post Trial Motions under Rules 52(b), 59(a) and 59(e) Federal Rules of Civil Procedure. In their individuality and in their totality the Motions are not well taken and are DENIED.

I

The Court's Findings and Conclusions in the Memorandum Opinion and Order of June 10, 1976, are well supported by the evidence and applicable law. It is clear that Kelley and Peerless are indebted to Cipra in the amounts found by the Court and no basis is established for a new trial or other post trial relief.

II

Plaintiff Kelley and third party defendant, Peerless, allege error of law in failing to grant a trial continuance due to absence at trial of executive of Kelley, namely Leonard A. Keller, a prospective witness. This case was filed on November 13, 1974; a pretrial order was signed as of July 14, 1975; the notice of trial setting was filed on March 16, 1976 with the trial to be set on the trailing

docket for three weeks beginning April 22, 1976; a motion for continuance was filed on April 21, 1976 and denied by the Court; a writ of mandamus was filed in the Tenth Circuit Court of Appeals on April 27, 1976 and denied on April 29, 1976. The trial in this case started on May 3, 1976.

The trial record of May 6, 1976, underscores the fact that Mr. Keller was available in the United States prior to trial for deposition and in fact no showing was made why he could not be present on Monday, May 3, 1976 (commencement of trial) to present his testimony. No persuasive showing was made why his foreign trip could not be delayed for a day or so.

The trial transcript of May 5, 1976 reflects the following:

THE COURT: Are you ready to proceed, Mr. Constantine?

MR. CONSTANTINE (an attorney for plaintiff Kelley): Yes, Your Honor.

The only point, would you like Mr. Kelley (executive of plaintiff Kelley Company) to confirm for the Court on the record on Mr. Keller's lack of availability because he has checked with his office:

THE COURT: If he would, please.

MR. PROCHNOW (an attorney for plaintiff Kelley): Your Honor, Mr. Kelley did furnish me with up to date resume of where Mr. Keller was as of recently.

Mr. Keller was out of the United States from April 19 through April 24. On April 25, Mr. Keller was in London. On April 26, Mr. Keller was in Cleveland, Ohio. April 27 and 28, Mr. Keller was in New York City and New Jersey for business connected duties with the Saudia Arabia and Korean trip with which he is now associated. On the 29th of April through May 1st which would have been last

Thursday, Friday, and Saturday, Mr. Keller was in Cleveland, Ohio. He left May 1st for Korea and is outside of the United States at this time.

THE COURT: Thank you very much, please.

Mr. Kelley, this is what you have related to the Court:

MR. KELLEY: Yes, Your Honor.

THE COURT: The record will so reflect. May we go ahead, please?

It is clear that Kelley and Peerless failed to make an effort to have Mr. Keller deposed in Colorado or Ohio or otherwise or perpetuate his testimony. Sufficient time was available prior to trial for Kelley and Peerless to effectuate this purpose. On April 21, 1976, Kelley and Peerless, were informed trial continuance would be denied, and no action was taken to have Mr. Keller deposed.

At trial, notwithstanding the absence of Mr. Keller, plaintiff Kelley was afforded every opportunity to present its case and the absence of Mr. Keller did not interfere with a fair trial to litigants.

III

IT IS ORDERED that the post trial motions of Kelley and Peerless in their entirety are DENIED.

DATED at Denver, Colorado, this 12th day of July, 1976.

BY THE COURT:

SHERMAN G. FINESILVER,
Judge United States District Court

APPENDIX B
40 U.S.C. § § 270a-270f

§ 270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such

contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

§ 270b. Same; rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to

sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

§ 270c. Same; right of person furnishing labor or material to copy of bond

The Comptroller General is authorized and directed to furnish, to any person making application therefor who

submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original. Applicants shall pay for such certified copies such fees as the Comptroller General fixes to cover the cost of preparation thereof.

§ 270d. Same; definition of "person"

The term "person" and the masculine pronoun as used in sections 270a-270c of this title shall include all persons whether individuals, associations, copartnerships, or corporations.

§ 270e. Same; waiver of sections 270a-270d with respect to Army, Navy, Air Force, or Coast Guard contracts

The Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Treasury may waive sections 270a-270d of this title with respect to cost-plus-a-fixed fee and other cost-type contracts for the construction, alteration or repair of any public building or public work of the United States and with respect to contracts for the manufacturing, producing, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, munitions, material, or supplies of any kind or nature for the Army, Navy, Air Force, or Coast Guard, respectively, regardless of the terms of such contracts as to payment or title.

§ 270f. Same; waiver of sections 270a to 270d of this title with respect to Commerce contracts

The Secretary of Commerce may waive sections 270a to 270d of this title, with respect to contracts for the con-

struction, alteration, or repair, of vessels of any kind or nature, entered into pursuant to the Act of June 30, 1932 (47 Stat. 382, 417—418), as amended. the Merchant Marine Act, 1936, or the Merchant Ship Sales Act of 1946, regardless of the terms of such contracts as to payment or title.

APPENDIX C

STANDARD LABOR MANAGEMENT FEE AGREEMENT AND SUBCONTRACT

Subcontractor Cipra, Inc.

Address 2065 S. Cherokee. City Denver

State Colorado Zip Code

Subcontractor No. _____

Project U.S. Bulk Mail Center Address 7755 E. 55th Ave. Commerce City, Colorado 80022

Project No. 903 P.O. No. _____. Subcontract No. 903-S6

This agreement, made and concluded this 13th day of August, A.D. 1973 by and between Cipra Inc., subcontractor, and the M. J. Kelley Company, hereinafter known as the contractor for the consideration hereinafter mentioned and contained, to furnish at the subcontractor's proper cost and expense all the necessary labor for the completion of the work in strict and absolute accordance of the specifications and plans of said work to the satisfaction and acceptance of the contractor and owner, with the express understanding that said subcontractor fully understands and has examined said plans and agrees to execute in full knowledge of the hereinafter mentioned stipulations.

Subcontractor herein agrees to furnish all said labor, tools, equipment and insurance in conjunction with the general conditions, except for special tooling or scaffolding as may be otherwise excluded in the Agreement terms.

FEE

1. A straight labor management fee of $38,190.00 will be paid on a percentage of progress billing basis with 25% held in retention until completion.

LABOR HOURS

2. It is mutually agreed that the declared hours of labor to be provided for this project is:

Plumbing	
Heating	
Excavation	
Sheet Metal	20,000 Hrs.
Sprinkler	
Other	

2a. Any modification of prefabricated work shall be considered extra work, and shall add to the stipulated Total Hours.... 20,000 Hrs.

to be paid by the subcontractor weekly as consumed. The M. J. Kelley Company will reimburse same on a monthly basis at the rate of $12.73 per hour. Said agreed to rate per labor hour includes workmen's compensation, unemployment, F.I.C.A., liability insurance, supervision, Union benefits, fringe benefits, administrative expense to formulate and otherwise account for payroll and/or its disbursements. After July 1974 contract negotiations, The M. J. Kelley Co. will pay amount of raise, if any.

ADD COMPENSATION

3. Upon completion, should any reduction of actual labor hours expended from the declared agreed to hours occur, then said savings will be split 50/50 between the parties with the subcontractor's share paid within 90 days after it is conclusively determined that the labor is complete.

SHARE OF LOSS

4. Upon completion, should the labor hours consumed exceed the agreed declared to labor hours, then the subcontractor contributes up to, but not more than 25% of the management fee toward the deficit.

WORK NOT INCLUDED

5. The following work is excluded from this contract:
   Rigging
   Fabrication (See 5a. Below)
   Excavation
   Special Tools
   Hanging Devices
   Scaffolding
   Other Allowance of $2,000.00 for hand tools & S.M. special tools

INABILITY TO PERFORM

6. It is expressly understood that this subcontractor's labor management fee is based on his valued desire to effectively manage his employees to produce the greatest productivity for the project and therefore the fee is a reward for this exercise of diligence, watchfulness, concern and direct control of his workmen; his failure to direct this effort would produce uncalculable damages to this project subjecting The M. J. Kelley Company to possible conditions beyond its normal ability to recover: therefore, it is expressly understood and agreed by the signatures that:

   a. Article (8) of the contract will be put into effect without recourse to The M. J. Kelley Company. (See 8a. Attached).

   b. This contract will become null and void without prejudice to The M. J. Kelley Company.

   c. Liability limited to amount of fee (See Section 1)

CHANGE ORDERS

7. Any and all change orders will alter this subcontract by addition or subtraction of labor hours, as they occur, to the declared labor hours as agreed herein enumerated. They shall be referenced, numbered and issued as they are received.

INTEREST

8. Should the subcontractor find it necessary to draw on its bank line of credit to meet the progressive weekly payrolls, The M. J. Kelley Company agrees to reimburse said interest incurred on a monthly basis at a rate of *actual interest cost invoiced* from

using bank on outstanding payroll advances for this project.

5a. Fabrication — It is understood that the sheet metal for this project will arrive to site in pre-coded, palleted form, delivered on truck; unloaded by the M. J. Kelley Co. forces, with supplemental labor as required by Cipra Inc. forces; placing material in or adjacent to bay in which it is to be installed. Contract will then begin.

GENERAL CONDITIONS

ARTICLE 1

APPROVAL OF WORKMANSHIP

All workmanship shall be subject to the inspection and approval of the Owner and The M. J. Kelley Company.

ARTICLE 2

INSURANCE

It is hereby understood and agreed that all conditions of responsibility for safety of persons and property, inspections, defective work, Workmen's Compensation, Social Security, or any and all other rules, laws relating thereto, whether included in GENERAL CONDITIONS of the subcontract or not shall be the responsibility of the subcontractor in the performance or completion of the work.

The Subcontractor shall, at its own cost, obtain and carry insurance in companies approved covering the work. Public liability and contingent public liability insurance in the amount of $300,000 for one person killed or injured, and subject to that limit a total of $1,000,000 for more than one person killed or injured in any one accident; and property damage and contingent property damage insurance in the amount of $250,000 for all damages arising out of injury to or destruction of property in any one accident, and subject to that limit a total of $500,000 for all damages arising out of injury to or destruction of property during the policy period. Furnish certified copies of policies if requested, together with evidence of payment or premiums. Subcontractor shall furnish evidence that he has complied with all laws in the performance of the work contracted including Workmen's Compensation and employer's liability, and that he has paid all contributions required

thereunder. Automobile insurance shall also be provided, for satisfactory limits, and shall include non-owned and hired cars.

Evidence of the above coverage represented by certificate or other forms must be furnished prior to starting work, such certificates or forms should state the Owner and The M. J. Kelley Company will be notified in writing ten (10) days prior to cancellation.

The Subcontractor shall be responsible for the loss, vandalism, theft, mysterious disappearance of his own property, including shanties, tools, machinery, and equipment, owned or hired, used in the performance of his work. He shall also be responsible for all his materials delivered to the site, or installed in the work, from inception of delivery until final acceptance of the work by the Owner. The Owner shall maintain fire and extended coverage insurance on work installed only.

If any hired or rented equipment is used on or in connection with the work to be performed and is insured, such policy of insurance covering such equipment shall be endorsed waiving subrogation against the Owner and/or The M. J. Kelley Company.

ARTICLE 3

STATE SALES TAX

This subcontract is exempt from the payment of state sales tax. If applicable, the values of the materials to be incorporated into and remain a part of the permanent structure is $ ....., labor and all other charges, $..... All other applicable taxes are to be included in the contract price whether or not ..... state sales tax, use tax, etc.

ARTICLE 4

WAGE RATES AND NON-DISCRIMINATION CLAUSE

The wage rates to be paid hereunder shall not be less than the prevailing rates of wages in the locality of the work. On all Government, State or Public Works contracts, the Subcontractor shall pay the minimum wages as determined by the Davis Bacon Act documents incorporated into the specifications. Subcontractor further agrees to accept in its entirety Title VII of the Civil Rights Act of 1964, the Presidential Executive Order 1124-16, and Ohio Revised Code 151.591 as a condition precedent in the life of this subcontract.

ARTICLE 5

TERMS OF PAYMENT

Payments will be made on or about the 25th day of each month, at the rate of * of the value of the work completed during the preceding month, the remaining ** to be paid within 30 days after completion and final acceptance of the Subcontractor's work by the Owner as evidenced by final payment therefore to The M. J. Kelley Company. Affidavit showing all monies due or to become due subcontractors, laborers and mechanics shall be submitted with final invoice. Affidavits may also be required with partial billings. and shall be furnished if requested. Final invoice must be rendered for all monies previously withheld (retained amounts) on partial billings.

* 100% Labor, 75% Management Fee

** 25% Management Fee

ARTICLE 6

GUARANTEE

It is understood that the Subcontractor hereby guarantees all the work to be performed under this subcontract against defects in workmanship for a period of one year (unless otherwise specified elsewhere) from the date of final acceptance of the completed work by the Owner. The Subcontractor shall, within a reasonable time after receipt of written notice thereof, make good any defects in workmanship which may develop during said one year period, and any damage to other work caused by the repairing of such defects at his own expense and without cost to The M. J. Kelley Company and/or Owner.

ARTICLE 7

SUBLETTING

No portion of this subcontract may be sublet without the prior approval, in writing, of The M. J. Kelley Company.

ARTICLE 8

TERMINATION OF SUBCONTRACT

The M. J. Kelley Company reserves the right to terminate this subcontract, if it is determined by The M. J. Kelley Company and/or Owner that the Subcontractor has misrepresented, acted in

ill faith, or in an otherwise unsatisfactory performance in the prosecution of this subcontract. Should the Subcontractor, for any reason, fail, neglect, or refuse to complete work as stipulated, The M. J. Kelley Company, upon three (3) days written notice to the Subcontractor, shall have the right to furnish necessary labor at prevailing compensation, and to collect the increase in cost and expense, if any there be, from the Subcontractor, or The M. J. Kelley Company shall have the right to annul and cancel this subcontract, and relet the work, and the said subcontractor shall not be entitled to any claim for damages on account of such annulment nor shall any such annulment affect the right of The M. J. Kelley Company to recover damages which may arise from such misrepresentation, ill faith, unsatisfactory performance, failure, neglect or refusal on the part of the Subcontractor to fulfill the terms of this subcontract.

ARTICLE 9

LIENS

The Subcontractor agrees to satisfy immediately any lien or incumbrance which, because of any act or default of the Subcontractor, is filed against the premises; and to indemnify and save the Owner and The M. J. Kelley Company harmless against all resulting loss and expenses, including attorney's fees.

ARTICLE 10

PERMITS AND LICENSES

The Subcontractor shall procure all permits and licenses necessary for carrying the work and shall comply with all regulations, ordinances, and laws relating to the work or the conduct thereof.

ARTICLE 11

PAYROLL TAXES

The Subcontractor shall comply with the provisions of any Social Security or Unemployment Insurance Laws, City, State or Federal, as now or hereafter in force, applying to the work and accepts exclusive liability, and will hold the Owner and The M. J. Kelley Company harmless for any contributions or taxes with respect to the work payable under any such laws.

ARTICLE 12

PATENTS

The Subcontractor agrees to protect and hold the Owner and The M. J. Kelley Company harmless against any and all demands and claims on account of infringements or alleged infringements of patented or alleged patented articles or inventories used on or for the work, and will, at its own cost and expense, defend any and all suits which may be brought against the Subcontractor, Owner, or The M. J. Kelley Company on account of infringements or alleged infringements, and pay any and all fees, costs and damages resulting therefrom.

ARTICLE 13

GOVERNMENT PROVISIONS

If this subcontract is in furtherance of a prime contract with the United States Government (only if prime contract number appears on face of this subcontract), it shall be understood that the work hereunder shall be performed in accordance with all applicable laws and regulations governing public contracts, including renegotiation, that now exist or may be enacted during the life of this subcontract.

ARTICLE 14

CLEAN UP

The Subcontractor shall keep the building and premises clean at all times of rubbish and debris caused by his work, and leave the building broom clean. Failure to do so will result in work being done by The M. J. Kelley Company or their agent and backcharged to the Subcontractor.

ARTICLE 15

CHANGES

The Subcontractor shall not proceed with any changes in the work until he has received approval in writing from The M. J. Kelley Company. All changes will be subject to the fair market value of the work not to exceed 5% overhead and 10% profit. Excessive demands beyond fair market value will be considered ill faith and misrepresentation to the subcontract.

ARTICLE 16

JURISDICTIONAL DISPUTES

Subcontractor shall prevent jurisdictional disputes and/or damages resulting to project progress by seeking immediate jurisdictional award of the National Board of Jurisdictional Awards in the building trades industry. Failure to do so shall give The M. J. Kelley Company the right to terminate subcontract and seek damges as heretofore specified.

IN WITNESS WHEREOF, the parties hereunto have affixed their signatures the day and year first above mentioned. Signed in the presence of

Cipra, Inc.	Project: U.S. Bulk Mail Center
2065 S. Cherokee	7755 E. 56th Ave.
Denver, Colorado	Address Commerce City, Colorado 80022
Subcontractor	

THE M. J. KELLEY COMPANY
4720 Warner Road
Cleveland, Ohio

By JOHN F. CIPRA, JR.
27 August, 1973

By JOSEPH J. MOHAR
Joseph J. Mohar 8-13-1973
Construction Manager

Both signature parties represent they are citizens of the United States and the Authorized officer of their respective firms impowered to implement and/or bind said firms in contract.

Witness	Date 8/27/73	Witness	Date 8-13-73
Witness	Date.....	Witness	Date .....

ARTICLE 8a.

Other than the reason mentioned in *Article 8, Termination of Subcontract*, the following procedure is mandatory prior to termination:

1. Written complaint served in provable process.
2. Seventy-two (72) hour waiting period for response.
3. On-Site meeting, should response prove unsatisfactory.

4. Final arbitration to the A.I.A. institute under the existing Arbitration Rules & Regulations in the State of Tennessee with the arbitrators ruling binding on all parties.

During the course of the procedure, work is to continue under the original contract until resolved.

September 17, 1973

Re: Denver Bulk Mail Center
Contract No. DACW 45-73-C-9016
Our Job No. 903

Subject: Appendix to Subcontract No. 903-S6
E.E.O. Clauses

The following clauses are to be incorporated in the above mentioned subcontract:

"THIRTY-FIRST. The Equal Opportunity provisions in Contractor's Contract with the Owner are incorporated herein with the same force and effect as though fully copied and written in this paragraph."

and

"FORTY-FIRST. The Subcontractor, and his subcontractors at any level, if any, will become signators to and will comply with the applicable Equal Employment Opportunity provisions including the "Denver Plan" by becoming signators to Part I of the Bid Conditions. In the event any subcontractor elects to become signatory to Part II of the Bid Conditions he may do so only if written approval is first obtained from the Project Manager."

JOHN F. CIPRA, JR., Pres.
Subcontractor

JOSEPH J. MOHAR
Joseph J. Mohar lm
Construction Manager

Cipra, Inc.
2065 S. Cherokee
Denver, Colorado

STATEMENT AND ACKNOWLEDGMENT

NAME AND ADDRESS OF PRIME CONTRACTOR (include ZIP Code)	NAME AND ADDRESS OF SUBCONTRACTOR (include ZIP Code)
THE M. J. KELLEY COMPANY 4720 Warner Road Cleveland, Ohio 44125	Cipra, Inc. 2065 S. Cherokee Denver, Colorado 80223
PRIME CONTRACT NUMBER DACW45-73-C-9016	DATE SUBCONTRACT AWARDED August 13, 1973

The prime contractor whose signature appears below states in accordance with the provisions of the clause entitled "Subcontractors" of his above-numbered contract with the UNITED STATES OF AMERICA that a subcontract was awarded on the date shown above by

The M. J. Kelley Company

to the subcontractor identified above to perform the following work:
Sheet Metal Labor Management

SUBCONTRACT AMOUNT ☒ $50,000 OR OVER ☐ UNDER $50,000	DATE SIGNED (Day, Month, Year) October 30, 1973
PROJECT U.S. Bulk Mail Center Phase III	TYPED NAME AND TITLE OF PERSON SIGNING FOR CONTRACTOR Joseph J. Mohar Construction Manager
LOCATION 7755 E. 56th Avenue Commerce City, Colorado 80022	BY (Signature)

The subcontractor whose signature appears below acknowledges in accordance with the provisions of the clause entitled "Subcontractors" contained in contract No. DACW45-C-9016, referred to above, that the following provisions of the prime contract are incorporated into and made a part of his subcontract:

Equal Opportunity	Apprentices
Contract Work Hours Standards Act—Overtime Compensation	Compliance with Copeland Regulations
Payrolls and Payroll Records	Subcontracts
Withholding of Funds	Contract Termination—Debarment
Davis-Bacon Act	

Names of intermediate subcontractors, if any, are:

DATE SIGNED (Day, Mo., Yr.)	TYPED NAME & TITLE OF PERSON SIGNING FOR SUBCONTRACTOR	BY (Signature)
11-2-73	John F. Cipra, Jr. President	

Standard Form of Agreement
and
Subcontract

Subcontractor Cipra, Inc.

Address 2065 S. Cherokee City Denver

State Colorado Zip Code 80223

Subcontractor No. _____

Project U.S. Bulk Mail Center Address 7755 E. 56th Avenue
Commerce City, Colorado 80023

Project No. 903 P.O. No. _____. Subcontract No. 903-S7

This agreement, made and concluded this 14th day of November A.D. 1973 by and between Cipra, Inc. subcontractor, and The M. J. Kelley Company, hereinafter known as the contractor for the consideration hereinafter mentioned and contained, to furnish at the subcontractor's proper cost and expense all the necessary material and labor for the completion of the work in strict and absolute accordance of the specifications and plans of said work to the satisfaction and acceptance of the contractor and owner, with the express understanding that said subcontractor fully understands and has examined said plans and agrees to execute in full knowledge of the hereinafter mentioned stipulations.

Subcontractor herein agrees to furnish all said labor, materials, tools, equipment and insurance in conjunction with the general conditions for the:

This purchase order is issued for the express purpose of the immediate fabrication of sheetmetal for the Service Area (Col. Line 1-2) complete but less; grills, registers, diffusers, flexible duct, volume dampers, fire dampers, access doors, air extractors, and flexible connections, but including turning vanes, duct lining, slides and drives. All fabrication to be in compliance with the plans and specifications. Shop drawings have been provided:

86,000 pounds Fabricated Sheet Metal at $0.55/Lb. $47,300.00
5,700 square feet Duct Lining ..... $ 2,528.00

For the consideration total lump sum price of Forty-Nine Thousand Eight Hundred Twenty Eight Dollars and no/100 ($49,828.00). Subject to additions or deductions, and that such price shall be paid in progress disbursements as hereinafter provided.

GENERAL CONDITIONS

ARTICLE 1
APPROVAL OF MATERIALS AND WORKMANSHIP

All material and workmanship shall be subject to the inspection and approval of the Owner and The M. J. Kelley Company.

ARTICLE 2
INSURANCE

It is hereby understood and agreed that all conditions of responsibility for safety of persons and property, Inspections, defective work, Workmen's Compensation, Social Security, or any and all other rules, laws relating thereto, whether included in GENERAL CONDITIONS of the subcontract or not shall be the responsibility of the Subcontractor in the performance or completion of the work.

The Subcontractor shall, at its own cost, obtain and carry insurance in companies approved covering the work. Public liability and contingent public liability insurance in the amount of $300,000 for one person killed or injured, and subject to that limit a total of $1,000,000.00 for more than one person killed or injured in any one accident; and property damage and contingent property damage insurance in the amount of $250,000.00 for all damages arising out of ..... or destruction of property in any one ...., and subject to that limit a total of $500,000.00 for any damages arising out of injury to or destruction of property during the policy period. Furnish certified copies of policies if requested, together with evidence of payment or premiums. Subcontractor shall furnish evidence that he has complied with all laws in the performance of the work contracted including Workmen's Compensation and employer's liability, and that he has paid all contributions required thereunder. Automobile Insurance shall also be provided, for satisfactory limits, and shall include non-owned and hired cars.

Evidence of the above coverage represented by certificate or other forms must be furnished prior to starting work, such certificates or forms should state the Owner and The M. J. Kelley Company will be notified in writing ten (10) days prior to cancellation.

The Subcontractor shall be responsible for the loss, vandalism, theft, mysterious disappearance of his own property, including shanties, tools, machinery, and equipment, owned or hired, used in the performance of his work. He shall also be responsible for all his materials delivered to the site, or installed in the work, from inception of delivery until final acceptance of the work by the Owner. The Owner shall maintain fire and extended coverage insurance on work installed only.

If any hired or rented equipment is used on or in connection with the work to be performed and is insured, such policy of insurance covering such equipment shall be endorsed waiving subrogation against Owner and/or The M. J. Kelley Company.

ARTICLE 3

STATE SALES TAX

This subcontract is exempt from the payment of state sales tax. If applicable, the values of the materials to be incorporated into and remain a part of the permanent structure is $....., labor and all other charges, $..... All other applicable taxes are to be included in the contract price whether or not state sales tax, use tax, etc.

ARTICLE 4

WAGE RATES AND NON-DISCRIMINATION CLAUSE

The wage rates to be paid hereunder shall be not less than the prevailing rates of wages in the locality of the work. On all Government, State or Public Works contracts, the Subcontractor shall pay the minimum wages as determined by the Davis Bacon Act documents incorporated into the specifications. Subcontractor further agrees to accept in its entirety Title VII of the Civil Rights Act of 1964, the Presidential Executive Order 11246, and Ohio Revised Code 151.591 as a condition precedent in the life of this subcontract.

ARTICLE 5

TERMS OF PAYMENT

Payments will be made on or about the 25th day of each month, at the rate of 90% of the value of the work completed during the preceding month, the remaining 10% to be paid within

30 days after completion and final acceptance of the Subcontractor's work by the Owner as evidenced by final payment therefore to The M. J. Kelley Company. Affidavit showing all monies due or to become due subcontractors, material suppliers, or laborers and mechanics shall be submitted with final invoice. Affidavits may also be required with partial billings, and shall be furnished if requested. Final invoice must be rendered for all monies previously withheld (retained amounts) on partial billings. Subcontractor further agrees partial payments are contingent upon receipt of monies for partial estimates submitted by The M. J. Kelley Company and paid for by Owner.

ARTICLE 6

GUARANTEE

It is understood that the Subcontractor hereby guarantees all the work to be performed and all the materials to be furnished under this subcontract against defects in materials or workmanship for a period of one year (unless otherwise specified elsewhere) from the date of final acceptance of the completed work by the Owner. The Subcontractor shall within a reasonable time after receipt of written notice thereof, make good any defects in materials or workmanship which may develop during said one year period, and any damage to other work caused by the repairing of such defects at his own expense and without cost to The M. J. Kelley Company and/or Owner.

ARTICLE 7

SUBLETTING

No portion of this subcontract may be sublet without the prior approval, in writing, of The M. J. Kelley Company.

ARTICLE 8

TERMINATION OF SUBCONTRACT

The M. J. Kelley Company reserves the right to terminate this subcontract, if it is determined by The M. J. Kelley Company and/or Owner that the Subcontractor has misrepresented, acted in ill faith, or in an otherwise unsatisfactory performance in the prosecution of this subcontract. Should the Subcontractor, for any reason, fail, neglect, or refuse to furnish materials or complete

work as stipulated; The M. J. Kelley Company, upon three (3) days written notice to the Subcontractor, shall have the right to purchase materials as may be needed, at the market rates in an open market and furnish necessary labor at prevailing compensation, and to collect the increase in cost and expense, if any there be, from the Subcontractor, or The M. J. Kelley Company shall have the right to annul and cancel this subcontract and relet the work, and the said Subcontractor shall not be entitled to any claim for damages on account of such annulment nor shall any such annulment affect the right of The M. J. Kelley Company to recover damages which may arise from such misrepresentation, ill faith, unsatisfactory performance, failure, neglect or refusal on the part of the Subcontractor to fulfill the terms of this subcontract.

ARTICLE 9

LIENS

The Subcontractor agrees to satisfy immediately any lien or incumbrance which, because of any act or default of the Subcontractor, is filed against the premises; and to indemnify and save the Owner and The M. J. Kelley Company harmless against all resulting loss and expenses, including attorney's fees.

ARTICLE 10

PERMITS AND LICENSES

The Subcontractor shall procure all permits and licenses necessary for carrying on the work and shall comply with all regulations, ordinances, and laws relating to the work or the conduct thereof.

ARTICLE 11

PAYROLL TAXES

The Subcontractor shall comply with the provisions of any Social Security or Unemployment Insurance Laws. City, State or Federal, as now or hereafter in force, applying to the work and accepts exclusive liability, and will hold the Owner and The M. J. Kelley Company harmless for any contributions or taxes with respect to the work payable under any such laws.

ARTICLE 12

PATENTS

The Subcontractor agrees to protect and hold the Owner and The M. J. Kelley Company harmless against any and all demands and claims on account of infringements or alleged infringements of patented or alleged patented articles or inventories used on or for the work, and will, at its own cost and expense, defend any and all suits which may be brought against the Subcontractor, Owner, or The M. J. Kelley Company on account of infringements or alleged infringements, and pay any and all fees, costs and damages resulting therefrom.

ARTICLE 13

GOVERNMENT PROVISIONS

If this subcontract is in furtherance of a prime contract with the United States Government (only if prime contract number appears on face of this subcontract), it shall be understood that the work hereunder shall be performed in accordance with all applicable laws and regulations governing public contracts, including renegotiation, that now exist or may be enacted during the life of this subcontract.

ARTICLE 14

CLEAN UP

The Subcontractor shall keep the building and premises clean at all times of rubbish and debris caused by his work, and leave the building broom clean. Failure to do so will result in work being done by The M. J. Kelley Company or their agent and backcharged to the Subcontractor.

ARTICLE 15

CHANGES

The Subcontractor shall not proceed with any changes in the work until he has received approval in writing from The M. J. Kelley Company. All changes will be subject to the fair market value of the work not to exceed 10% overhead and 10% profit. Excessive demands beyond fair market value will be considered ill faith and misrepresentation to the subcontract.

ARTICLE 16

JURISDICTIONAL DISPUTES

Subcontractor shall prevent jurisdictional disputes and/or damages resulting to project progress by seeking immediate jurisdictional award of the National Board of Jurisdictional Awards in the building trades industry. Failure to do so shall give The M. J. Kelley Company the right to terminate subcontract and seek damages as heretofore specified.

IN WITNESS WHEREOF, the parties hereunto have affixed their signatures the day and year first above mentioned. Signed in the presence of

Cipra, Inc.
2065 S. Cherokee,
Denver, Colorado
Subcontractor

Denver Bulk Mail Center
7755 E. 56th Ave.
Commerce City, Colorado
Address _____

THE M. J. KELLEY COMPANY
4720 Warner Road
Cleveland, Ohio

By JOHN F. CIPRA, JR., Pres.
20/Nov./1973

By LEONARD A. KELLER
Leonard A. Keller,
Vice President,
Special Projects 11/14/1973

Both signature parties represent they are citizens of the United States and the authorized officer of their respective firms impowered to implement and/or bind said firms in contract.

Witness Date 11/20/73 Witness Date 11/14/73

Witness_____ Date_____ Witness_____ Date_____

September 6, 1973

M. J. Kelly Company
Bulk Mail Facility
Denver, Colorado
Attention: Mr. Heinz Strip

Re: Bulk Mail Facility
Denver, Colorado

Gentlemen:

We propose to furnish all labor, tools, materials, equipment and services necessary to perform the sheet metal work at the subject job which is not included in our contract dated August 12, 1973 with the M. J. Kelly Company; all work to be performed in accordance with the instructions of M. J. Kelly Company. We further propose that the work be performed on a time and material basis, the actual value of the work to be established as follows:

1. *Labor.* All work performed at the job site will be at the rate of $12.73 per hour, which includes workmen's compensation, unemployment benefits, FICA, liability insurance, supervision, Union benefits, fringe benefits and administrative expense, plus 10% profit. On this basis, the work performed at the job site would be at the rate of $14.00 per hour.

Work performed in the Cipra, Inc. shop. Since fabrication and shop work involves much expensive equipment, work at the shop must therefore be at an increased overhead. We therefore propose the $12.73 per hour, plus 10% overhead, plus 10% profit. On this basis, shop labor would be at the rate of $15.40 per hour.

2. *Material.* All materials required for the installation, normally carried as inventory, such as galvanized sheets, alloy sheets, angle iron, structural shapes, duct liner, flexible connection material, etc., would be billed at Cipra, Inc. invoice cost, plus 10% overhead, plus 10% profit.

3. *Equipment and Special Materials.* All equipment and materials purchased specifically for the job and not handled as inventory, would be billed at Cipra, Inc. invoice cost, plus 10% profit. Copies of invoices to be furnished with billing.

4. *Billing*. The work performed to be billed monthly, complete with a detailed breakdown of all expenditures, showing hours worked on the job, base rates, costs of the materials, copies of invoices, etc.

Respectfully submitted,

CIPRA, INC.

MAX M.

MADSEN

Max M. Madsen

J. Mohar

M. J. Kelly Co.

9-14-73

MMM/pw

CERTIFICATE OF SERVICE

I, James R. Prochnow, a member of the Bar of the Supreme Court of the United States and counsel of record for the M. J. Kelley Company, petitioner herein, hereby certify that on June 9, 1978, pursuant to Rule 33 of the Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari and Appendix on Cipra, Inc., respondent herein, by depositing such copies in the United States mail in Denver, Colorado, with first class postage prepaid, properly addressed to the mailing address of W. Robert Ward, Weller, Friederich, Hickisch & Hazlitt, counsel of record for Cipra, Inc., at 900 Capitol Life Center, Denver, Colorado 80203.

All parties required to be served have been served.

DATED: June 9, 1978.

CONSTANTINE & PROCHNOW, P.C.

By: James R. Prochnow

James R. Prochnow
5555 DTC Parkway
Englewood, Colorado 80110
(303) 770-5610

In the Supreme Court of the United States

October Term, 1977

NO. 77-1759

THE M. J. KELLEY COMPANY AND
THE PEERLESS INSURANCE COMPANY,
Petitioners,

v.

CIPRA, INC.,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT CIPRA, INC., IN OPPOSITION TO PETITION FOR CERTIORARI

WELLER, FRIEDRICH, HICKISCH & HAZLITT
MARTIN J. ANDREW
W. ROBERT WARD
900 Capitol Life Center
Denver, Colorado 80203
Phone: 303/861-8000

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Cipra, Inc., respondent, herein referred to as CIPRA, opposes the petition for certiorari in this matter, on the ground there are no special or important reasons this diversity case should be reviewed by this Court.

QUESTION PRESENTED

The true question before the Court is whether, in a diversity of citizenship case, under 28 U.S.C. § 1332, involving claims for breach of a second-tier subcontract arrangement on a construction job, this Court should review the lower court's application of a general rule of construction and interpretation of ambiguous and indefinite contracts, that the conduct of the parties relating to the subject matter of the contract before any controversy arose between them, is one of the best indications of the true intent of the parties.

STATUTE INVOLVED

Respondent submits the federal court jurisdiction in this case is based solely upon 28 U.S.C. § 1332(a), diversity of citizenship; and that the Miller Act, 40 U.S.C. § 270a et seq., referred to in the Petition, is not involved in this case.

28 U.S.C. § 1332 provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

STATEMENT OF THE CASE

The action involves disputes between the mechanical subcontractor Kelley, and its sub-subcontractor, CIPRA, relating to part of the construction of a United States Post Office bulk mail center, Commerce City, Colorado. The prime contractor, Wright-Dick-Boeing, and its Miller Act surety, were not parties to the action.

Kelley commenced the action in the United States District Court for Colorado, as a diversity case, under 28 U.S.C. § 1332, seeking damages for alleged breach by CIPRA of the second-tier subcontract. CIPRA denied liability, and counterclaimed, basing jurisdiction solely on 28 U.S.C. § 1332, diversity, against Kelley and joined Kelley's surety, Peerless Insurance Company, claiming for labor and material furnished by CIPRA under the sub-subcontract arrangement and for extras. CIPRA had Miller Act (40 U.S.C. § 270a et seq.) rights against the prime contractor Wright-Dick-Boeing, and its Miller Act surety, since CIPRA had a "direct contractual relationship with a subcontractor [Kelley] but no contractual relationship, express or implied, with the contractor furnishing said payment bond . . . " (40 U.S.C. § 270b(a)). CIPRA did not institute suit in this action as required by the Miller Act, "in the name of the United States for the use of . . . " CIPRA. No such Miller Act suit was ever commenced by CIPRA, and CIPRA's Miller Act rights are now time barred, since more than one year has expired since the last labor was performed or material supplied by CIPRA.

The case was tried to the Court, which found the second-tier subcontract arrangement was controlled by a contract of August 13, 1973, a letter of September 6, 1973, an additional contract of November 4, 1973, and by purchase orders issued by Kelley for "extras" performed by CIPRA. CIPRA billed Kelley as work progressed, but

Kelley failed to pay monthly as required by the contractual arrangement, and Kelley was in arrears in paying CIPRA in the sum of $155,681.49. After demands by CIPRA that payments be brought current, negotiations, and notice, CIPRA withdrew its work forces, and the sub-subcontract was terminated. On the basis of all the evidence, the trial court found that Kelley had breached the contractual arrangements, that $155,681.49 plus interest was due CIPRA from Kelley, for which Peerless as surety for Kelley was jointly and severally liable, and entered judgment in favor of CIPRA against both for the sum of $178,327.68.

In construing the ambiguities existing in the contractual arrangement as to billing rate for extras, and whether billings by CIPRA for an on-the-job foreman were proper, as well as Kelley's contention at trial of erroneous and inadvertent early payments of CIPRA's billings, the trial court considered the conduct and transactions of Kelley and CIPRA before any controversy arose. While the trial court placed much reliance on this course of conduct in determining the true intent and meaning of the contractual arrangement, it did not find or rule that Kelley's "course of conduct" in paying early invoices of CIPRA before dispute, precluded or estopped Kelley from disputing billings of CIPRA. Rather the trial court found (Appendix to Petition - 21):

> The repeated payments made under the contract prior to the dispute here are highly persuasive of the acceptance by Kelley of Cipra's interpretation of the contract. Such a course of dealing has great force in interpreting the contract and has been considered by the court in reaching its conclusions. We find that the course of dealing demonstrates a clear agreement by the parties as to the terms of the contract and is evidence of what was contemplated by the contract. A

> later attempt by Kelley to vary the procedures is in derogation of the contract and constitutes wrongful breach. Although not determinative, the fact that Kelley has presented the instant billings of defendant to the main contractor, Wright-Dick-Boeing, in their entirety, serves to underscore our findings that the claims are legitimate.

The United States Court of Appeals for the Tenth Circuit affirmed, holding the trial court's findings of fact were supported by the record. The Tenth Circuit specifically stated (Appendix to Petition - 12 and 13):

> The trial court properly considered the transactions which took place before the breach as part of the conduct of the parties to evaluate the contentions of error and inadvertence advanced by Kelley. The court also properly used this information in its construction of the letter and the agreements. In Hensel Phelps Const. Co. v. United States, 413 F.2d 701 (10th Cir.), a Miller Act case, we referred to correspondence between the parties, and said:
>
> > '. . . This evidence was pertinent because if the contract is not clear the conduct of the parties is given great weight in construing it (Citing cases).'
>
> See also United States v. Cross, 477 F2d 317 (10th Cir.); Whitebird v. Eagle-Picher Co., 390 F.2d 831 (10th Cir.).

Neither the trial court nor the Tenth Circuit Court of Appeals ruled that the prior course of conduct amounted to waiver or worked an estoppel and no issue in this regard, nor a request to enunciate federal substantive contract law, was presented to the lower courts by the petitioners.

ARGUMENT

1. THIS IS A DIVERSITY OF CITIZENSHIP CASE, AND IS NOT A MILLER ACT CASE, AND THE REASONS PETITIONERS URGE FOR REVIEW DO NOT APPLY TO THIS CASE.

Petitioners recognize, in their statement of the case at page 2 of the Petition, that Kelley's original action was a diversity case, jurisdictionally based on 28 U.S.C. § 1332, but mistakenly contend that CIPRA's counterclaim was premised upon the Miller Act, 40 U.S.C. § 270 a(b).

There is no requirement in the Miller Act that a subcontractor such as Kelley, on a public building or public work of the United States, furnish performance or payment bonds. The Miller Act requirements apply only to the principal contractor, which in this case is Wright-Dick-Boeing. 40 U.S.C. § 270b(a) grants a second-tier subcontractor, such as CIPRA, a conditional right of action on the Miller Act bond of the prime contractor. The second-tier subcontractor's right is conditioned by the Miller Act upon giving timely notice of claim and timely commencing suit in the name of the United States within one year. There is no provision in the Miller Act making the suit against the prime contractor's Miller Act bond the exclusive remedy of a second-tier subcontractor.

Here, CIPRA elected to sue Kelley, and to sue Kelley's surety, Peerless, rather than to pursue the Miller Act action available to it.

In this non-Miller Act case, petitioner urges the case involves the Miller Act, in an attempt to bootstrap the case within the considerations governing review on certiorari set forth in Rule 19 of the Supreme Court rules.

This Court, in a Miller Act action, *F. D. Rich Co., v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 127 (1974), stated:

> The Miller Act Provides a federal cause of action, and the scope of the remedy as well as the substance of the right created thereby is a matter of federal not state law.

There is no indication that the rule announced in the *Rich* case is intended to apply to non-Miller Act, diversity of citizenship cases in the federal courts arising out of construction contract disputes. Rather, the rule to be applied in diversity cases such as this one, is stated in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938).

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.

The circuit courts have recognized that there is some question as to whether federal substantive law controls over state law in Miller Act cases. *United States ex rel. Building Rentals Corp. v. Western Casualty & Surety Co.*, 498 F.2d 335, 338 n.4 (9th Cir. 1974); *Burgess Construction Co. v. M. Morrin & Son Co.*, 526 F.2d 108, 114 n.2 (10th Cir. 1975). It is submitted resolution of that question by this Court should be made in a Miller Act action, and does not justify review of this diversity case by this Court.

II. THE LOWER COURTS IN THIS CASE APPLIED THE GENERAL PRINCIPLE OF LAW, APPLIED IN COLORADO COURTS AND ELSEWHERE, THAT IN THE CONSTRUCTION AND INTERPRETATION OF AMBIGUOUS AND INDEFINITE CONTRACTS, THE INTERPRETATION BY THE PARTIES TO THE CONTRACT, AS SHOWN BY THEIR CONDUCT RELATING TO THE SUBJECT MATTER BEFORE ANY CON-

TROVERSY AROSE BETWEEN THEM, IS ONE OF THE BEST INDICATIONS OF THE TRUE INTENT OF THE PARTIES; AND, THE APPLICATION OF THAT PRINCIPLE OF LAW IN THIS DIVERSITY CASE DOES NOT WARRANT REVIEW BY THIS COURT.

The memorandum opinion and order of the trial court, and the opinion of the United States Court of Appeals for the Tenth Circuit are set forth in the Appendix A (pp. 10-25) of the Petition herein. It is clear the lower court considered the transactions between the parties under the contract arrangement before disputes in construing the agreement and letter arrangement, and in resolving the ambiguity as to the rates for billing of extras and whether billings for an on-the-job foreman were proper, as well as evaluating Kelley's contention at trial that it erroneously and inadvertently paid CIPRA's early bills.

There was ambiguity as to the billing rate for extras, because of conflict in the language of the August 13, 1973, subcontract (Petition Appendix - 37-46) in paragraph 7 and article 15; and in the letter agreement of September 6, 1973 (Petition Appendix - 55-56). There was ambiguity as to whether the word "supervision" in the items included in the rate per labor hour in paragraph 2 of the agreement of August 13, 1973, included an on-the-job foreman.

The Colorado courts recognize and apply this general principle of law in construction and interpretation of ambiguous contracts. *Thompson v. McCormick*, 149 Colo. 465, 370 P.2d 442 (1962); *Cohen v. Clayton Coal Co.*, 86 Colo. 270, 281 P. 111 (1929). The Tenth Circuit has applied the rule in Miller Act cases, such as *Hensel Phelps Construction Co. v. United States*, 413 F.2d 701 (10th Cir. 1969), and non-Miller Act cases, *United States v. Cross*, 477 F.2d 317 (10th Cir. 1973); *Whitebird v. Eagle-Picher Co.*, 390 F.2d 831 (10th Cir. 1968). This rule

is supported and enunciated in the general authorities, including Restatement of the Law of Contracts, § 235(e) (1932), and 3 Corbin, Contracts, § 558 (1968).

In this diversity case, the trial was to the court without a jury and the court made findings of fact on the basis of all the evidence, including the conduct of the parties, upon which it placed much reliance. The Tenth Circuit Court of Appeals affirmed, holding the trial court's findings of fact were supported by the record.

Petitioners, by their Petition in this Court, misconstrue and misstate the lower court's findings and rulings by alleging that ruling was that the "course of conduct" in paying bills early in the construction project amounted to a waiver or estoppel to dispute bills later on. Rather, the lower court simply and correctly applied a universal rule of construction of ambiguous contracts and evaluated that evidence and other evidence in finding the true intent and meaning of the parties. It is true that the trial court's finding of the meaning of the contractual arrangement did obligate the petitioner to pay the CIPRA billings, just as Kelley had properly paid the earlier billings. This obligation arose from contract, and not from estoppel or waiver.

The rulings of the trial court as to the basis for construing the ambiguous contractual arrangement were correct applications of the general principle of law relating to construction of ambiguous contracts, and review by this Court is not warranted.

III. THE PETITIONERS' ALLEGED REASON FOR GRANTING THE WRIT OF CERTIORARI, THAT IS TO DETERMINE WHETHER FEDERAL OR STATE LAW GOVERNS CONSTRUCTION OF FEDERAL MILLER ACT CONTRACTS, WAS NOT RAISED IN OR PRESENTED TO THE COURT OF APPEALS AND IS NOT A PROPER MATTER FOR REVIEW BY THIS COURT.

Although Kelley opposed the CIPRA billings for extras and on-the-job foreman at the trial of this case and in its appeal, this opposition was based primarily upon Kelley's alleged inadvertent and erroneous payment of early billings of CIPRA, and on Kelley's position as to the intent and meaning of the second-tier subcontract agreements. At no time in these proceedings, prior to the petition for writ of certiorari, did Kelley or Peerless assert that this was a Miller Act case in which federal substantive law controls in the interpretation and construction of the ambiguous contract. Petitioners do not in their Petition allege what this Court should state the federal substantive law to be as to the effect of evidence of conduct of the parties before dispute in construing an ambiguous contract.

In *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967), this Court stated:

> In a short passage at the end of her brief to this Court, petitioner suggested that she has a valid ground for a new trial in the District Court's exclusion of opinion testimony by her witness concerning whether respondent's scaffold platform was adequate for the job it was intended to perform. This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari, even though the relevant portions of the transcript were made a part of the record on appeal. Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here. Supreme Court Rule 40(1) (d) (2). See *J. I. Case Co. v. Borak*, 377 U.S. 426, 428-429, 84 S. Ct. 1555, 1557-1558, 12 L. Ed2d 423; *State of California v. Taylor*, 353 U.S. 553, 556-557, n.2, 77 S. Ct. 1037, 1039-1040, 1 L. Ed.2d 1034.

Where the Court of Appeals was not presented the issue of whether this was a Miller Act case and whether federal substantive law should control over state law in construing the contract, it is submitted the Court of Appeals could not render a decision meeting any of the criteria set forth in Rule 19(b) of the Supreme Court rules, setting forth considerations governing review on certiorari.

CIPRA submits this issue, asserted for the first time in the petition for certiorari, should not be considered by the Court in this case.

CONCLUSION

There are no special or important reasons this diversity case should be reviewed by this Court. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Martin J. Andrew, a member of the Bar of the Supreme Court of the United States and counsel of record for Cipra, Inc., respondent herein, hereby certify that on July 19, 1978, pursuant to Rule 33 of the Rules of the Supreme Court, I served the foregoing Brief of Respondent Cipra, Inc., in Opposition to Petition for Certiorari on Petitioners by depositing three copies thereof in the United States Mail at Denver, Colorado, with first class postage prepaid, addressed to each counsel of record for Petitioners: James R. Prochnow, Esq., Constantine and Prochnow, P.C., 5555 DTC Parkway, Englewood, Colorado 80110, for The M. J. Kelley Company; and Harmon S. Graves, Esq., Tilly & Graves, 50 South Steele Street, Suite 800, Denver, Colorado 80209, for the Peerless Insurance Company. All parties required to be served have been served.

DATED: July 19, 1978.

Martin J. Andrew